LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 20 1962
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 626

UNITED STATES OF AMERICA, ex rel., CARTER-SCHNEIDER-NELSON, INC., a Corporation,
*Appellant,*

vs.

JACK T. CAMPBELL, Doing Business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a Corporation,
*Appellees.*

## Brief in Opposition to Petition for Writ of Certiorari

ARTHUR M. BOHNERT, JR.
369 Pine Street
San Francisco 4, California
*Attorney for Appellees*

*Of Counsel*
BOHNERT & MCCARTHY
DUDLEY HARKLEROAD
BARRETT LUCEY AND HARKLEROAD
369 Pine Street
San Francisco 4, California

SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

## SUBJECT INDEX


Page

Introduction ... 1

Statement of Facts and Pleadings Pertinent to Opposition to the Petition ... 2

Reasons for Denying the Petition for Certiorari ... 3

I. The Decision in the case at bar is not contrary in any respect to the decisions of the United States Supreme Court, the Court of Appeals of other Circuits or the Court of Appeals of the 9th Circuit ... 3

II. The decision in the case at bar is in complete accord with the Miller Act, the decisions of the United States Supreme Court and the decisions of the several Courts of Appeals ... 9

III. Response to miscellaneous general statements contained in the petition ... 11

IV. No error was committed in holding that use plaintiff's Exhibit 4 was inadequate notice ... 13

Summary ... 14

## TABLE OF AUTHORITIES CITED


| Cases | Pages |
|---|---|
| Bowden v. United States (9th Cir. December 31, 1956), 239 Fed. 2d 572; cert. denied 77 S. Ct. 864 | 8, 10, 11 |
| Coffee v. United States for the use and benefit of Gordon (5 Cir. 1946), 157 Fed. 2d 968 | 5, 6 |
| Douds v. Seafarers International Union, 148 F. Supp. 953 | 11 |
| Fleisher Engineering & Construction Company v. United States of America for the use and benefit of George S. Hallenback, 311 U.S. 15, 61 S. Ct. 81, 85 L. Ed. 12 | 4, 5, 10 |
| Houston Fire and Casualty Ins. Co. v. U.S. for the use of Trane Co. (5th Cir. 1954), 217 Fed. 2d 727 | 6 |
| Kunglig v. Dexter & Carpenter, Inc., 32 Fed. 2d 195 | 11 |
| MacEvoy Company v. United States of America for the use of Calvin Tomkins Company, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163 | 10 |
| McWaters & Bartlett v. U.S. for the use of Wilson (10th Cir. 1959), 272 Fed. 2d 291 | 7 |
| United States for the use and benefit of Hopper Bros. Quarries v. Peerless Cas. Co. (8th Cir. 1958), 255 Fed. 2d 137 | 6, 7 |
| United States v. Campbell, 293 Fed. 2d 816 | 2 |
| U.S. v. Northwestern Engineering (8th Cir. 1941), 122 Fed. 2d 600 | 7 |

| Statutes | |
|---|---|
| The Miller Act, 40 USC 270(b) | 2, 3, 4, 8, 9, 10, 11, 13, 14 |

| Other Authorities | |
|---|---|
| H. Rep. No. 1263, page 578 (74th Cong. 1st Sess.) | 9 |

# In the Supreme Court of the United States

OCTOBER TERM, 1961

**No.** .....

UNITED STATES OF AMERICA, ex rel., CARTER-SCHNEIDER-NELSON, INC., a Corporation,
*Appellant,*

vs.

JACK T. CAMPBELL, Doing Business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a Corporation,
*Appellees.*

## Brief in Opposition to Petition for Writ of Certiorari

### INTRODUCTION

The petition for certiorari deals with two distinctly separate cases and in each case an entirely different question is raised. This brief in opposition to the petition is on behalf of the defendant parties to the Miller Act bond on the contract for Nike installations at Travis Air Force Base. This action in the District Court was No. 36746, and before the Court of Appeals was Appeal 17182. While the Travis Air Force Base case was consolidated with another case involv-

ing Fort Funston for the purpose of trial, separate opinions and separate judgments were rendered by the trial court judge. The Court of Appeals wrote only one opinion, but carefully dealt separately with each case.

The District Court and the Court of Appeals both held that use plaintiff had not given timely notice of his claim as required by the Miller Act.

The sole question presented, insofar as this action is concerned in connection with the petition for certiorari, is whether or not the courts below so erred in holding that the notice was not timely or proper under the Miller Act as to cause this Court to grant a petition for certiorari.

It is the position of these successful defendant parties to the action involving Travis Air Force Base that the courts below did not commit error and that both decisions below are in full accord with the decisions of this Honorable Court, the decisions of the Court of Appeals of other Circuits, and prior decisions of the Court of Appeals of the 9th Circuit.

## STATEMENT OF FACTS AND PLEADINGS PERTINENT TO OPPOSITION TO THE PETITION

The claim of use plaintiff is for equipment supplied to a subcontractor. By stipulation, December 5, 1956 was the last day that any of the equipment was at the jobsite or available for use (Volume II, Record Page 164; *United States v. Campbell*, 293 Fed. 2d 816 at 820). By the evidence, December 3, 1956 was the last day that any of the equipment was used on the job (plaintiff's Exhibit H).

Nowhere in the record is there one scrap or iota of evidence that the general contractor, or the surety, on the Travis Air Force Base job knew, or had any reason to believe, that equipment owned by use plaintiff was being used on the job. The equipment did not even bear any identifying marks.

Paragraph X of the complaint in this action (Volume I, Record Page 8) sets forth the notice upon which use plaintiff, under oath, relied. This notice was dated March 8, 1957 more than ninety days after December 5, 1956), and was alleged to be a notice mailed by registered mail, addressed to the general contractor, stating with substantial accuracy the amount of rental accrued and unpaid. This is not the notice relied upon as the basis for this petition and set forth on pages 1 and 2 of the appendix to the petition. No amendment has ever been offered by use plaintiff to its pleading, and use plaintiff is bound by the verified allegations of its complaint.

The notice set forth on pages 1 and 2 of the appendix to the petition is addressed to the surety (not even the general contractor) on the other job, Fort Funston, involved in the companion case. Further, plaintiff's Exhibit 4 on pages 1 and 2 of the appendix to the petition is artfully incomplete. The actual letter of January 21, 1957, was on the letterhead of Anderson-McPharlin & Conners and signed by a partner in that firm, Eldon V. McPharlin. By request for admission 16 and the answer thereto and by reference to the transcript Volume II, Record 203, it is admited that this firm (and Eldon V. McPharlin, the attorney signing the letter) is admittedly one of the leading firms of attorneys for contractors and bonding companies in the State of California.

## REASONS FOR DENYING THE PETITION FOR CERTIORARI

### I. The Decision in the case at bar is not contrary in any respect to the decisions of the United States Supreme Court, the Court of Appeals of other Circuits or the Court of Appeals of the 9th Circuit.

Petitioner has argued that the decision in the case at bar is not in accord with decisions of this Court and several Courts of Appeals announcing the rule that the Miller Act

must receive a liberal interpretation and holding, in very proper cases, that the notice requirements of the Act should specifically receive liberal interpretation.

The point, however, is this: in each decision referred to in the petition for certiorari, the Supreme Court or the particular Court of Appeals was dealing with a factual situation where the general contractor did in fact have actual notice of the use of the equipment and of the potential claim of the use plaintiff. In such cases, the parties to the Miller Act bond (the general contractor and the surety) sought nakedly to rely on the technical failure of some uninformed supplier of material or equipment to send notice in exactly the manner required by the Act. Such a factual situation is not here present.

The cases cited by petitioner will be reviewed separately and briefly to illustrate to this Honorable Court that there is no reason for granting a petition for certiorari:

(1) *Fleisher Engineering & Construction Company v. United States of America for the use and benefit of George S. Hallenback*, 311 U.S. 15, 61 S. Ct. 81, 85 L. Ed. 12, also reported before the Court of Appeals at 107 F.2d 925:—The sole question before the Supreme Court of the United States is stated by the court, at page 17 of the U.S. Reports and at page 14 of the Law Edition Reports to be:

> "The question is whether the giving of the required written notice to the contractor was sufficient, as it was not sent by 'registered mail'."

It was conceded in the case that there was actual written notice, though not registered, and that the contents of the notice were adequate.

The Supreme Court stated:

> "The Circuit Court of Appeals held that as the receipt of written notice was conceded and the contents of the notice were adequate, the statute was satisfied."

The Court of Appeals, at page 928, stated:

> "It is admitted that the notice was in writing and sent by mail and reached one of the two contractors."

In the primary case relied upon by petitioners, there is then absolutely no conflict for the questions raised in the case at bar and in this petition were not even considered by the Supreme Court or the Court of Appeals.

(2) *Coffee v. United States for the use and benefit of Gordon* (5 Cir. 1946), 157 Fed. 2d 968:—The sole question in this case involved the method of service or transmittal of actual notice to the general contractor, Coffee. The decision of the Court of Appeals affirms the judgment below and the findings of the trial judge as follows:

> "*About the middle of June, 1941, well within the 90 day period*, Gordon called on C. G. Coffee, one of the partners of Coffee Construction Company . . . and advised Coffee of the balance due from Smith and Rose (the subcontractors) to Gordon. At the same time Gordon *handed* Coffee a statement in writing of the sums Gordon claimed to be due him from Smith and Rose on account of the work above mentioned. The various items of indebtedness were summarized on the written statement which showed that Smith and Rose owed Gordon $8,279.38 and Gordon explained to Coffee the entire situation and discussed the account with him. Coffee *had actual manual possession* of the written statement and full opportunity to examine it, *having held it in his hand* during the discussion. . . ."

The court in *Coffee* then held, following the Supreme Court in *Fleisher Engineering & Construction Co. v. United States*, supra, at 970 in effect, that "registered mail notice" was not necessary and that "a writing containing the information which the statute requires, exhibited to the contractor by the claimant as a notice of his claim and which the

contractor examines and discusses and might have taken if he desired, was a written notice sufficiently served" (particularly in the light of certain Florida statutes authorizing the service of a summons by reading the summons to the person to be served). Absolutely nothing more is involved in the *Coffee* case than that which we have stated and the court did not even consider the question of timeliness of the notice or adequacy of the notice.

(3) *Houston Fire and Casualty Ins. Co. v. U.S. for the use of Trane Co.* (5th Cir. 1954), 217 Fed. 2d 727; in this case there was concededly no written notice whatsoever; there was concededly oral notice and the general contractor had written to the claimant fully acknowledging the notice and giving full recognition to the indebtedness of the subcontractor to Trane. The Court of Appeals states:

> "(This) . . . was more effective than if a written notice had been sent by the materialmen and fully complied with the essential statutory requirements of bringing home in writing to the principal contractor the requisite knowledge of the claim and debt."

Here again, as distinguished from the case at bar, the general contractor had full actual and complete notice of the claim.

(4) *United States for the use and benefit of Hopper Bros. Quarries v. Peerless Cas. Co.* (8th Cir. 1958), 255 Fed. 2d 137: Here again the general contractor had actual notice and acted on it as if there had been proper notice. The language of the court at page 142 is as follows:

> "Under the circumstances of this case the plaintiff's letter to the contractor of August 6, 1953, received by the contractor the next day and answered on the following day, must be deemed a giving of written notice by the materialman to the contractor. The contractor accepted it as such and in accordance with it notified

> Anton, Hammond, Dunn, Inc. that the plaintiff materialman had not been paid by the subcontractor and was making demand for payment".

It is also noteworthy that in the *Peerless* case the bonding company involved for all parties was the same and that the court, on page 146 recognized that stricter cases such as *U.S. v. Northwestern Engineering* (8th Cir. 1941), 122 Fed. 2d 600 should not control where the general contractor admittedly had, or should have had, some actual notice within the 90-day period. The facts and holding of *Peerless Casualty* are clearly different from those in the case at bar.

(5) *McWaters & Bartlett v. U.S. for the use of Wilson* (10th Cir. 1959), 272 Fed. 2d 291: the appeal on the Miller Act feature of the case deals solely with the sufficiency of the evidence regarding the giving of notice. No substantial question of law was involved at all. The court stated, at page 294:

> "While, of course, there is other evidence from which appellant seeks to draw its conclusions, we think the evidence outlined above is sufficient to support the court's finding that written notice of Wilson's claim was served upon McWaters and was brought home to him. . . . If the above evidence is believed, as it was by the court, it establishes that a written claim was served on McWaters. He saw the writing, and knew that the amount was claimed from Clark, his subcontractor, for work and labor performed in fulfillment of the contract."

As distinguished from the case at bar, there was again actual notice to the general contractor. It is also interesting to note that claimant Wilson was apparently a small specialized contractor supplying labor and material to a general contractor and his attempts at notice (which very pointedly resulted in actual notice) may be viewed with some sym

pathy; whereas in the case at bar the attempts of attorney McPharlin, a leading bonding company attorney, at giving notice do not demand much in the way of sympathy, particularly where no actual notice could have come from any other source in connection with the Travis Air Force Base job.

(6) *Bowden v. United States* (9th Cir. December 31, 1956), 239 Fed. 2d 572; cert. denied 77 S. Ct. 864:—It is odd that petitioner seeks to rely on some conflict between the holding of the Court of Appeals of the 9th Circuit in the case at bar and in the earlier case of *Bowden v. United States*. Judge Burke in his District Court decision and the Court of Appeals in its decision in the case at bar cite, meticulously follow and rely on *Bowden v. United States*. It is also noteworthy that *Bowden v. United States* reversed the District Court, holding that a letter addressed by a subcontractor to the general contractor and listing the claim of a potential supplier or sub-subcontractor and requesting the general contractor to pay the claim was not proper notice under the Miller Act. In *Bowden* the use claimant, who prevailed below, asserted on appeal that the Act required liberal construction and argued that the letter from the subcontractor (not the claimant) to the general contractor gave the general contractor all of the information that it would have obtained if the use plaintiff-claimant had given it the written notice provided by the statute. The court states:

> "But this argument goes too far, too fast. It overlooks entirely the fact that the statute makes the requirement of written notice from the supplier a condition precedent to a right of action on the bond; and no rule of liberality in construction can justify reading out of the statute the very condition which Congress laid down as prerequisite to the cause of action. . . . It is not consistent

with either this intent or the mechanics of the statute if a prime contractor is required to choose between withholding payment to his subcontractors indefinitely or acting on peril of learning thereafter that some writing, by some person, located somewhere in his files, contains sufficient information regarding accounts between a supplier and the subcontractor to render him liable for the subcontractor's bill. . . . We do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond."

The court then cites in its footnote at page 578 H. Rep. No. 1263 (74th Cong. 1st Sess.):

"One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. 'Equity aids the vigilant'".

## II. The decision in the case at bar is in complete accord with the Miller Act, the decisions of the United States Supreme Court and the decisions of the several Courts of Appeals.

The foregoing section of this brief has illustrated that there is no conflict between the case at bar and previous decisions of this Honorable Court and of the several Courts of Appeals of the various Circuits. It is respectfully submitted that not only does no conflict exist, but the Miller Act itself and the decisions of this Honorable Court and the various Circuits all support the holding in the case at bar.

The Miller Act, 40 USC 270(b), certainly, in clear and concise language, specifies that one not having a contractual relationship with the general contractor must give notice

to the general contractor within 90 days and further prescribes the method by which this notice is to be given. No court has ever held that the general contractor need not have any notice. Several courts have held that if the general contractor does have full and actual notice, the court can, and will in a proper case, relax the technical method of giving notice, which would then be an idle act. These cases do not hold, and for that matter do not intimate, that the notice provisions of the Miller Act may be completely disregarded or judicially dispensed with.

In liberally construing the Miller Act this Honorable Court has never ignored the statute and in *MacEvoy Company v. United States of America for the use of Calvin Tomkins Company*, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, it was stated:

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. (*Fleisher Engineering & Construction Co. vs. United States*, 311 US 15, 17, 18, 85 L. Ed. 12, 14, 15, 61 S. Ct. 81; *United States use of Noland Co. vs. Irwin*, 316 US 23, 29, 30, 86 L. Ed. 1241, 1245, 1246, 62 S. Ct. 899.) But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds."

To the same effect in *Fleisher Engineering & Construction Co. v. United States for the use of Hallenbeck*, supra, a case upon which petitioner relies, the court stated:

> "And at this bar, the actual receipt of the notice and the sufficiency of its statements have not been challenged."

Finally, and more recently this Honorable Court denied Certiorari in *Bowden v. U. S.*, *supra*, 77 S. Ct. 864, 353 U.S.

957, 1 L. Ed. 2d 968 indicating no conflict between the several circuits and an unwillingness to disregard completely the language of the Act.

The decisions of the various Courts of Appeals need not be reviewed. None of them holds that the notice requirements of the Miller Act may be totally ignored. Some of the decisions have given a liberal interpretation of the Act, stating that the method of giving notice becomes relatively unimportant if in fact the general contractor had actual notice; the cases hold nothing more.

### III. Response to miscellaneous general statements contained in the petition.

On page 5 of the petition, certain misleading and in fact untrue statements are made by use plaintiff.

The fact is that use plaintiff instituted two separate actions each alleging and demanding under oath sums in excess of $40,000.00 for equipment used at each job. The pleading in the earlier action involving the Fort Funston job, action 36430, appeal 17181, is verified under oath by the attorney for use plaintiff. Being verified, it is admissible and was admitted in evidence (Volume II Record, Page 202) as an admission, by one not only presumptively authorized, but one actually authorized, according to the testimony of the principal officer of use plaintiff, it is binding upon use plaintiff. (Volume II Record Page 195). *Douds v. Scatarers International Union*, 148 F. Supp. 953; *Knuglig v. Dexter & Carpenter, Inc.*, 32 Fed. 2d 195.

The later verified contrary allegations contained in the complaint in action 36746, all of the contrary evidence and the present argument, are unequivocally impeached and eliminated by the earlier statements under oath in action 36430.

Petitioner also intimates that it was deprived of judgment for some $33,000.00. This is not the case. Petitioner, use plaintiff below, offered no evidence of any nature (beyond its contention from the stipulation entered into between use plaintiff and the defendants in the other job to use on that other job) of use of its equipment on the Travis Air Force Base job. It was, however, at the trial conceded by use plaintiff that there was no privity whatsoever between the general contractor and use plaintiff and that the liability of the parties here opposing the petition could arrive, if at all, only under the Miller Act bond (Volume II Record Page 105, 106, and 205). By no stretch of the imagination is it the problem of the general contractor and surety on the Travis Air Force Base job to show what days the equipment in question was used. The fact that the general contractor and surety on the other job were willing to stipulate to less than the total amount of use claimed on its job (while it might be greatly to the advantage of the defendants in that action), has nothing whatsoever to do with use on the Travis job or the burden of proof that use plaintiff must meet.

While the position taken in the foregoing paragraph is primarily directed at the amount of dollars and the extent of use of the equipment, the same thing applies to the matter of timely and proper notice under the Miller Act. The fact that proper notice may have been given in connection with the Fort Funston job or the fact that the general contractor and surety did not contest notice on that job does not dispense with the requirement that there be timely and proper notice in connection with the Travis Air Force Base job.

While it does not properly pertain to a petition for a writ of certiorari, use plaintiff, at page 5 of its brief, has

mislead the Court regarding the financial damage to use plaintiff. An examination of the record in the District Court will clearly show that use plaintiff has lost nothing. Use plaintiff was willing to sell the equipment to the subcontractor for the amount stipulated in the lease. If the $12,232.00 admittedly paid is added to the $7,273.33 recovered against Fidelity & Casualty Company of New York on the Fort Funston job and the sale price or reasonable value of the equipment after it was all repossessed as testified to by the principal officer of use plaintiff, the total equals or exceeds the initial agreed sale price in the lease. Accordingly, it is petitioner here who seeks another double recovery just as it sought when it filed the two separate actions in the District Court under verified complaints.

## IV. No error was committed in holding that use plaintiffs Exhibit 4 was inadequate notice.

The Miller Act and the cases thereunder require that the notice inform the prime contractor that the supplier is looking to him for payment of the subcontractor's bill, that the notice be in writing addressed to the prime contractor and that the writing state with substantial accuracy the amount of rental claimed in connection with the equipment on the job in question.

While we contend that the only notice that should be considered by this Court is that referred to in the complaint, which is not Exhibit 4, we nonetheless point out to the Court that Exhibit 4 by no stretch of the imagination can satisfy the requirement of the Act and cases thereunder. Exhibit 4 is addressed not to the prime contractor, but to a different surety on a different job. While it does make reference to the Travis Air Force Base job, it totally

fails to comply with the statutory language to state "with substantial accuracy" the amount of rental claimed in connection with the equipment on the job in question. Use plaintiff exhibited, and this can be seen by referring to the various notices given, a complete familiarity with the provisions of 40 USC 270(b).

As stated by the District Judge in his opinion, Record Volume 1 Page 30:

> "A different construction of the circumstances can only be arrived at in the light of plaintiff's attempts to rise by their own bootstraps. . . . Plaintiff has failed to convince this court that there is any ground or justification for relieving him from compliance with the notice requirements of the Miller Act which are a prerequisite to his right to recover against the surety."

## SUMMARY

It is respectfully submitted that certiorari should not be granted in connection with the case involving the Travis Air Force Base job for the following reasons:

a) Neither the District Court nor the Court of Appeals for the 9th Circuit have committed any error.

b) The holdings of the court below are completely in accord with the holdings of this Honorable Court and of the several Courts of Appeal.

Respectfully submitted,

ARTHUR M. BOHNERT, JR.
*Attorney for Appellees*

*Of Counsel*
BOHNERT & MCCARTHY
DUDLEY HARKLEROAD
BARRETT LUCEY & HARKLEROAD